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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 RICKY WAYNE EVERETT,

10 Plaintiff,

11 v.

12 C/O HULBERT et al.

13 Defendants.

CASE NO. C11-5775-RJB-JRC

REPORT AND  
RECOMMENDATION TO DISMISS  
PRIOR TO SERVICE

NOTED FOR: November 18, 2011

14 This 42 U.S.C. §1983 civil rights matter has been referred to the undersigned Magistrate  
15 Judge pursuant to 28 U.S.C. §§ 636 (b)(1)(A) and (B) and Local Magistrate Judge Rules MJR 1,  
16 MJR 3, and MJR 4. The Court recommends dismissal of this action without prejudice because  
17 plaintiff is challenging the loss of 100 days of good time credits and specifically asks for  
18 restoration of lost good time in the complaint (ECF No. 1 proposed complaint). Thus, plaintiff is  
19 attempting to challenge the fact or length of his incarceration in a civil rights action.

20 If a petitioner is challenging the very fact or duration of physical imprisonment, and the  
21 relief sought will determine whether petitioner is or was entitled to immediate release or a  
22 speedier release from that imprisonment, petitioner's sole federal remedy is a writ of habeas  
23 corpus. Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).  
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1 The United States Supreme Court held that "[e]ven a prisoner who has fully exhausted  
2 available state remedies has no cause of action under § 1983 unless and until the conviction or  
3 sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas  
4 corpus." Heck v. Humphrey, 512 U.S. 477, 487 (1994). The Court added:


5 Under our analysis the statute of limitations poses no difficulty while the state  
6 challenges are being pursued, since the § 1983 claim has not yet arisen. . . . [A]  
§ 1983 cause of action for damages attributable to an unconstitutional conviction  
or sentence does not accrue until the conviction or sentence has been invalidated.

7 Id. at 489. "[T]he determination whether a challenge is properly brought under § 1983 must be  
8 made based upon whether 'the nature of the challenge to the procedures [is] such as necessarily  
9 to imply the invalidity of the judgment.' Id. If the court concludes that the challenge would  
10 necessarily imply the invalidity of the judgment or continuing confinement, then the challenge  
11 must be brought as a petition for a writ of habeas corpus, not under § 1983." Butterfield v. Bail,  
12 120 F.3d 1023, 1024 (9th Cir. 1997) (*quoting* Edwards v. Balisok, 520 U.S. 641 (1997)).

13 This defect cannot be cured by amendment. The Court recommends this action be  
14 dismissed without prejudice.

15 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
16 fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P.  
17 6. Failure to file objections will result in a waiver of de novo review by the District Court Judge.  
18 See, 28 U.S.C. 636 (b)(1)(C). Accommodating the time limit imposed by Rule 72(b), the clerk is  
19 directed to set the matter for consideration on November 18, 2011, as noted in the caption.

20 Dated this 7th day of October, 2011

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23 J. Richard Creatura  
24 United States Magistrate Judge